IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:2.4.2007

CORAM:

THE HONOURABLE MR.JUSTICE P.JYOTHIMANI

S.A.No.707 of 1995

A.S.Murugan ... Appellant[Plaintiff]

Versus

1.Neelavathi
2.Rajaram
3.Suresh ...Respondents[Defendants]

Second Appeal filed under Section 100 of the Civil Procedure Code against the Judgment and Decree of the learned Additional Subordinate Judge of Chengalpattu dated 24.01.1994 in A.S.No.49 of 1993 confirming the Judgment and Decree of the learned District Munsif of Maduranthakam dated 29.07.1993 in O.S.No.335 of 1992.

For Appellant : Mr.V.Sanjay for V.Nicholas.

For Respondents : T.V.Krishnamachari

J U D G M E N T

The short point of legal issue involved in this case is as to whether the will marked as Ex.A9 dated 04.08.1986 said to have been executed by one Raji Gounder in favour of Dhanalakshmi, who is the vendor of the plaintiff is valid and the same has been proved and alternatively, if there are any defects in the will, can a lesser relief be granted in respect of some of the properties forming part of the will, since in respect of few items of properties there has been a rectification regarding Survey Numbers.

2. The unsuccessful plaintiff in both the Courts below is the appellant herein. He stated to have purchased four items of suit properties from one Dhanalakshmi under a sale deed dated 20.07.1992 marked as Ex.A12. The four items of properties said to have been purchased by the plaintiff under the sale deed are all situated in Amayapattu Village, Madurantakam Taluk as follows:

1. Wet Survey No.11/3 to the extent 0.32 cents together with well 3 H.P.Pumpset and shed and electric service connection.
2. Wet Survey No.13/8 to the extent of 0.19 cents

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3. Wet Survey No.13/10 to the extent of 0.14
4. Dry Survey No.20/1 to the extent of 0.66, to the total extent of 1.31 acres as stated in the plaint, however stated as 1.35 acres in the Ex.A12.

3. The case of the plaintiff was that originally, the property belonged to Raji Gounder, who purchased the four items of properties under various documents and enjoyed the same as his own. The first defendant is the wife of Raji Gounder, the second defendant is the son and the third defendant is the son of the second defendant. During the last days, the said Raji Gounder was living with one Dhanalakshmi, who is his mother's sister's daughter. Raji Gounder is stated to have executed a will in favour of Dhanalakshmi on 04.08.1986 in respect of four items marked as Ex.A9. It was based on the said will, the said Dhanalakshmi has executed the sale deed in favour of the plaintiff as Ex.A12. The suit was resisted by the defendants on the ground that the property was ancestral property and the said Raji Gounder had no right to dispose of the entire properties. The defendant has filed O.S.No.38/88 for partition and the same is pending. Raji Gounder himself has filed a suit for injunction against the defendant in O.S.No.2/87 and that was dismissed. Suppressing the pendency of the partition suit, the present suit is filed. On an analysis of the entire evidence, the Trial Court has come to a conclusion that the will stated to have been executed by Raji Gounder has not been properly proved and therefore the Will is not valid and consequently the purchase stated to have been made by the plaintiff from Dhanalakshmi, which was itself based on the disposition given under the will was also held to be not valid.

4. It was as against the said Judgment of the Trial Court, the plaintiff has filed first appeal. The First Appellate Court also on analysis of the entire evidence and having concurred with the Trial Court that the Will has not been proved dismissed the appeal, against which, the present second appeal is filed by the plaintiff.

5. While admitting the second appeal the following substantial question of law was framed for consideration:

"When the attestors of the Will executed by Raji Gounder were no more and that the plaintiff examined the identifying witness and the scribe of the Will which is a registered one and thus proved the will in a manner known to law whether the courts below are correct in holding the issue against the plaintiff."

6. While it is the case of the plaintiff that he seeks the declaration in respect of the four items of the properties based on the sale deed marked as Ex.A12 dated 20.07.1992 stated to have been executed by Dhanalakshmi in his favour, Dhanalakshmi herself got right in respect of these properties under a Will stated to have been executed by Raji Gounder in her favour dated 04.08.1986 marked as Ex.A9. It is based on the Will, Dhanalskhmi claims title and consequently it is the plaintiff's responsibility to prove the genuineness of the Will Ex.A9. On fact it is seen and as also admitted by the learned counsel for the

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appellant Mr.N.E.A.Dinesh that the Will contained four items of properties. In respect of items No.1 and 2, the Will itself contains a wrong Survey Number and it was based on the said Will, Dhanalakshmi has executed Ex.A12 sale deed in favour of the plaintiff. It was only after some years, the mistake was realised and it is an admitted case of the plaintiff that his vendor Dhanalakshmi has executed a rectification deed in his favour on 05.08.1992 marked as Ex.A17. But it remains the fact on a reference to Ex.A12 shows that in respect of Item No.1 of the said properties, the original sale deed Ex.A12 has mentioned the Survey Number as 8/11 to the extent of 0.36 cents along with 3 Hp Electric motor pumpset which was modified as Survey No.11/3 to the extent of 0.32 cents with 3 HP Electric Motor. Likewise, in respect of Item No.2 of the property mentioned in Ex.A12 which was stated as Nanja Survey No.13/8 measured as 0.19 cents was modified as Survey No.10/8 to the extent of 0.19 cents. However, there is no change in the third and fourth items. It remains the fact that while Ex.A12 has been executed by Dhanalakshmi based on Ex.A9 Will of Raji Gounder dated 04.08.1986, a reference to the Will marked as Ex.A9 shows that it contains the same Survey Number in respect of items No.1 and 2 as it is seen under Ex.A12 sale deed. In view of the above said factual position, it is clear that by rectification deed, dated 05.08.1982 marked as Ex.A17 given by Dhanalakshmi in favour of the plaintiff, the plaintiff cannot get any title atleast in respect of Items No.1 and 2 of the properties since there is a difference between the document relied upon by the plaintiff for his title in respect of those items namely Ex.A12 and Ex.A17 and the original Will which is basis for such document. It is also true that in respect of Items No.3 and 4 there is no change. Therefore, before going into the aspect as to whether Raji Gounder has got any competency to execute the Will or even assuming that the Will has been executed, the same has been proved in the manner known to law, the issue which has to be decided is as to whether the documents relied upon by the plaintiff namely Ex.A12 and Ex.A17 can give any title to the plaintiff at all. It is in view of this situation, Mr.N.E.A.Dinesh, learned counsel appearing for the appellant would submit that the Court has got power to give lesser relief.

7. To substantiate his contention, he would rely upon the Judgment of this Court rendered in Kesavalu Naidu V. Doraiswami Naidu (died) and Others (1958 1 MLJ 189). That was a case wherein, a suit for declaration of joint ownership of property set apart for and used as a passage while, there was a finding that claim to ownership has not been proved. The question arose as to whether a restricted relief of user of passage can be granted. It was in those circumstances, this Court has held granting lesser relief. While the plaintiff claims more than what he is entitled to, the Court will not dismiss the suit but give the relief to which he is entitled to. This Court has also held that it is the duty of the Court to mould the relief to be granted to the parties according to the facts proved. The relevant portion of the Judgment are as follows:

> "c. Where the plaintiff claims more than what he is entitled to, the Court will not dismiss the suit but give the plaintiff only such relief as he is entitled to. Pitambar v. Ram Joy;

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Lakshman v. Hari; Venkataramana v. Verabalu; Khamta Mandalassi v. Hem Kumari.
The fact that plaintiff asked for relief larger than the facts asserted by him would warrant is no ground for refusing him the lesser relief to which on the facts found he is entitled: Bhihu v. Puttu. In fact as Odgers put it, where a party cannot be exact, it is wiser to claim too much rather than too little as a Judge does not give more than that which the plaintiff requires – Judex non Reddi injuriam subi datam punire.

d) But where the plaintiff claims less than what he is entitled to, the Court will not grant him any relief he has not specifically claimed unless the plaint is amended before the judgment: Sooriah Row v. Cotaghery, Pereival V. Collector of Chittagong. But the Court should not refuse to grant a relief not specifically claimed in the plaint, if such relief is obviously required by the nature of the case and is not inconsistent with the relief specifically claimed and raised by the pleadings: Gulabgir v. Nathmal. Too much insistence should not be laid on the technicalities of pleadings. It is the duty of the Court to mould the relief to be granted to the parties according to the facts proved which, however, should not be inconsistent with the pleadings, Mehar Chand v. Milkhi Ram."

8. While absolutely there is no quarrel about the proposition as laid by this Court in the said Judgment, I do not think that fact of the present case can be taken as an instance for the purpose of granting relief to the plaintiff. The reliance placed on by the learned counsel for the applicant on the Division Bench of this Court rendered in Pentapati Venkataramana and Others V. Pentapati Varahalu and Others (A.I.R.1940 Madras 308) is also not applicable to the facts of the present case. That was again a case where in respect of dissolution of partnership when the plaintiff has claimed a wider relief which cannot be granted, but at the same time, it was held that it will not deprive him to restrict his right to a limited relief.

9. The one other Judgement of the Honourable Supreme Court cited by the learned counsel, in my considered view has no application to the facts of the present case. That was the case rendered by the Supreme Court in Kedar Lal Seal and another Vs. Hari Lal Seal (A.I.R.(39) 1952 SC 47). That was a case relating to suit for contribution under the Transfer of Property Act in which it was held that the Courts will be slow in throwing out a claim on a mere technicality, while deciding about Order 6 Rule 2 of Civil Procedure Code, regarding method of computation. The Honourable Supreme Court has held that it is a matter of law and it is for the Judge to apply the law to the facts and give the plaintiff such relief as appropriate to the case. The operative portions of the Judgement reads as follows:

"The learned counsel for the plaintiff-respondent urged that the defendants are shut out from relying on S.82 because that was not their case and the question was never raised by them in the High court. Such reference as there is to the section was with

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reference to an argument urged on behalf of the plaintiff. I am not impressed with this objection. On the facts set out by the plaintiff it is evident that he is entitled to contribution. The method of computation is a matter of law and it is for the Judges to apply the law to the facts stated and give the plaintiff such relief as is appropriate to the case."

10. Again in the context of this Suit, one has to remember that the very basis of Dhanalakshmi to convey title to the plaintiff under Ex.A12 as rectified under Ex.A17 was the Will stated to have been executed by Raji Gounder on 04.08.1986 marked as Ex.A9. When the basic Will itself is defective in its nature, since it contains different Survey Numbers and different extent of lands, I do not think that the said defect is curable in nature or any relief can be given to a party in respect of other properties of the Will, since the basis of the Will is in stake.

11. Therefore, the contention raised on behalf of the appellant that a limited relief can be given to the plaintiff in respect of Item Nos.3 and 4 under Ex.A9 will is not sustainable.

12. Now coming to the validity of the Will, it is true that on appreciation of the Judgment of both the Courts below, it is made very clear that factually the Courts below have come to the conclusion that the Will has not been proved on the appreciation of witness including the attesting witness and scribe and in such circumstances at the outset, I have no hesitation to hold that this is only a factual situation and therefore the question of this Court interfering under Section 100 of the Civil Procedure Code does not arise.

13. The contention raised by the learned counsel for the appellant that the validity of the will executed by Raji Gounder has never been questioned cannot be accepted for the simple reason that it is for the plaintiff who comes to the Court on the basis of a document, which in its turn totally depends upon the Will executed by Raji Gounder, to prove that the Will was properly executed and it was a valid Will. It is the case of the defendant that the suit properties are joint family properties and infact the defendants have filed suit for partition as seen in O.S.No.38/1998 under Ex.B8. Under such circumstances, the onus of proof is certainly heavy on the plaintiff to prove the genuineness of the will Ex.A9. A reference to the evidence of the attesting witness P.W.1 and P.W.5 scribe is discussed by both the Courts below would show that those witnesses are not worthy witnesses and they were in fact found to be either document writer or the identifying witness P.W.4 as a person always loitering in the Register office as rightly contended by the learned counsel for the respondent. It is for the plaintiff to prove the genuineness of the Will and he cannot take advantage of the defects or weakness on the other side as laid down by the Division bench of this Court in P.Panneerselvan Vs. A.Baylis S/o V.Anbumani (2005 5 CTC Pg 17). As held by this Court while referring to Order 39 Rule 1 of Civil Procedure Code in S.Ramesh

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Babu Vs. R.Bhaskar and another (2003 (1) CTC 345), the burden is on the plaintiff to prove and cannot take advantage of the weakness in defence and the relevant portion of which reads as follows:

> " 15.The learned counsel for the revision petitioner contends that the lease deed has not been produced by the first defendant and as such adverse inference can be drawn against him. The burden is only upon the petitioner to prove his case and he cannot take advantage of the weakness in defence. In fact, the first defendant already filed O.S.No.2494/99 for permanent injunction relating to the entire property and he could have filed the lease deed in that suit. The learned counsel for the first defendant also relied on Chellathurai and five others v. Perumal Nadar, 1998 (3) M.L.J 567 that in a suit for injunction, it is the duty of the plaintiff to prove that he continued to be in possession on the date of the suit. Only when evidence on both sides are let in title to the property will have some relevance, Merely because the defendant has failed to prove his case, it does not follow that the plaintiff is in possession."

14. The mere fact that Ex.A9 Will is a registered document does not stand in a better footing. In view of the factual finding about the veracity of the attesting witness and also the scribe examined as P.W.4 and P.W.5 found by both the Courts below, I do not think that it is fit case where any substantial question of law arises for consideration.

15. In view of the same, the second appeal fails and the same is dismissed. There will be no order as to costs.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

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To

1. Additional Subordinate Judge,
   Chengalpattu.

2. The District Munsit,
   Maduranthakam.

3. The Section Officer,
   V.R.Section,
   High Court, Chennai.

+ 1 CC To Mr. V.Nicholas, Advocate SR NO.20850
+ 2 CCs To Mr. T.V.Krishnamachari, Advocate SR NO.20921, 20739

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